

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,)	
)	
Plaintiff/Respondent,)	CR 04-0328-3 PHX NVW
)	
v.)	CIV 05-2472 PHX NVW (MEA)
)	
GUADALUPE ARREDONDO ZAZUETA,)	
)	
Defendant/Movant.)	REPORT AND RECOMMENDATION
)	
)	

TO THE HONORABLE NEIL V. WAKE:

Mr. Guadalupe Arredondo-Zazueta ("Movant") is currently incarcerated in a federal prison facility in New Mexico, pursuant to his conviction before the United States District Court for the District of Arizona. On August 16, 2005, Movant filed a motion seeking a reduction of his sentence, pursuant to 28 U.S.C. § 2255, asking the Court for clemency and placement in a half-way house. See Docket No. 189. Movant filed an amended section 2255 motion on October 24, 2005. Docket No. 193. Respondent filed a Government's Response to Defendant's Motion to Vacate, Set Aside or Correct Sentence ("Response") on March 20, 2006 (Docket No. 198).

I. Procedural History

In 2004, Movant was charged with conspiracy to possess with the intent to distribute 1,000 kilograms or more of marijuana and with possession of firearms in furtherance of a

1 drug trafficking offense. Movant and two other individuals were
2 arrested while in a vehicle containing 154 pounds of marijuana,
3 which was observed leaving a residence in Phoenix, Arizona.
4 Response at 3. Additionally, as a result of the investigation
5 involving Movant, a search warrant was executed at the
6 aforementioned residence, resulting in the discovery of 2,230
7 pounds of marijuana, an AR-15 rifle, and an AK-47 rifle. Id. at
8 3.

9 On January 19, 2005, Movant was arraigned on a
10 superceding indictment. See Docket No. 138. On April 1, 2005,
11 pursuant to a plea agreement, Movant pled guilty to conspiracy
12 to possess with the intent to distribute 100 kilograms or more
13 of marijuana. See Docket No. 165. The plea agreement
14 stipulated that the quantity of marijuana Movant conspired to
15 possess and distribute was between 100 and 400 kilograms of
16 marijuana. Docket No. 183 at 2. The plea agreement provided
17 that Movant would receive a sentence within the range specified
18 in the United States Sentencing Guidelines for Movant's offense
19 of conviction, and noted that the maximum term of imprisonment
20 was forty years and the minimum was five years. See id. The
21 plea agreement stipulated to a three-level reduction in the
22 applicable sentence guideline for Movant's acceptance of
23 responsibility if he signed the plea agreement no later than
24 April 7, 2005. Id. at 3.

25 The plea agreement stipulated to the minimum term of 60
26 months imprisonment pursuant to Movant's conviction. See id. at
27 3. The plea agreement also provided Movant was, by pleading
28 guilty, waiving any right to appeal or collaterally attack his

1 conviction and sentence if the sentence imposed was consistent
2 with the terms of the plea agreement. Id.

3 The plea agreement states:

4 The defendant waives any and all motions,
5 defenses, probable cause determinations, and
6 objections which the defendant could assert
7 to the indictment or information or to the
8 Court's entry of judgment against the
9 defendant and imposition of sentence upon the
10 defendant, providing the sentence is
11 consistent with this agreement. The
12 defendant further waives: (1) any right to
13 appeal the Court's entry of judgment against
14 defendant; (2) any right to appeal the
15 imposition of sentence upon defendant under
16 Title 18, United States Code, Section 3742
17 (sentence appeals); and (3) any right to
18 collaterally attack defendant's conviction
19 and sentence under Title 28, United States
20 Code, Section 2255, or any other collateral
21 attack. The defendant acknowledges that this
22 waiver shall result in the dismissal of any
23 appeal or collateral attack the defendant
24 might file challenging his conviction or
25 sentence in this case.

26 Id. at 4. The plea agreement further stated that, if the matter
27 were to proceed to trial, the United States could prove Movant
28 had conspired with others to distribute 100 kilograms or more of
marijuana and that Movant and others had conspired to provide an
undercover police officer with 300 pounds of marijuana on or
about April 1, 2004. Id. at 6.

29 Movant further stated in the plea agreement that he had
30 discussed the plea agreement with his counsel and understood its
31 provisions. Id. at 7. Movant averred that he had agreed to the
32 provisions of the agreement "as a voluntary act on my part and
33 I agree to be bound to its provisions." Id. at 8. He further
34 stated: "I am satisfied that my defense attorney has represented
35 me in a competent manner.... This agreement has been read to me

1 in Spanish and I have carefully reviewed every part of it with
2 my attorney. I understand it, and I voluntarily agree to it."
3 Id. at 8.

4 The plea agreement was signed by both Movant and his
5 counsel on April 1, 2005. Id. at 8-9.

6 On June 20, 2005, pursuant to the terms of the plea
7 agreement, Movant was sentenced to a term of 60 months
8 imprisonment followed by four years of supervised release. See
9 Docket Nos. 181 & 182.

10 Movant did not file a direct appeal regarding his
11 conviction and sentence. Movant does not assert he is not
12 guilty of the crime of conviction. See Docket No. 193 at 2.
13 Movant asserts he is entitled to relief because he was deprived
14 of his right to the effective assistance of counsel. He also
15 contends his conviction was obtained by a coerced confession,
16 i.e., that the prosecutor did not recommend the reduction in the
17 amount of his sentence as promised, and because he was denied
18 his right to appeal his conviction and sentence.

19 II. Discussion

20 **A. Respondent contends that the section 2255 motion**
21 **must be denied because Movant waived his right to appeal or**
collaterally attack his conviction and sentence.

22 The plea agreement signed by Movant expressly waived
23 his right to raise on appeal or collaterally attack any matter
24 pertaining to Movant's conviction and sentence if the sentence
25 imposed was consistent with the written terms of the agreement.
26 See Docket No. 183. Movant admits he knew at the time he
27 entered his plea agreement that he was waiving his right to a
28 direct appeal. See Docket No. 193.

1 As stated supra, the plea agreement provides:

2 The defendant further waives: (1) any right
3 to appeal the Court's entry of judgment
4 against defendant; (2) any right to appeal
5 the imposition of sentence upon defendant
6 under Title 18, United States Code, Section
7 3742 (sentence appeals); and (3) any right to
8 collaterally attack defendant's conviction
9 and sentence under Title 28, United States
10 Code, Section 2255, or any other collateral
11 attack. The defendant acknowledges that this
12 waiver shall result in the dismissal of any
13 appeal or collateral attack the defendant
14 might file challenging his conviction or
15 sentence in this case.

16 Docket No. 183 at 4.

17 The sentence imposed on Movant was consistent with the
18 terms of the plea agreement, i.e., Movant received a sentence of
19 60 months imprisonment. The sentence was in accordance with the
20 plea agreement and, therefore, Movant waived his right to
21 collaterally attack his conviction and sentence. Because Movant
22 waived his rights to bring this action, the section 2255 motion
23 may be summarily denied. See Mabry v. Johnson, 467 U.S. 504,
24 508-09, 104 S. Ct. 2543, 2546-47 (1984) ("It is well settled
25 that a voluntary and intelligent plea of guilty made by an
26 accused person, who has been advised by competent counsel, may
27 not be collaterally attacked."); United States v. Jeronimo, 398
28 F.3d 1149, 1157 (9th Cir. 2005) (reaching this conclusion in the
context of a direct appeal wherein the defendant waived his
right to directly appeal or collaterally attack his conviction
and sentence in a plea agreement); United States v. Bolinger,
940 F.2d 478, 480-81 (9th Cir. 1991). See also Williams v.

1 United States, 396 F.3d 1340, 1342 (11th Cir. 2005).¹

2 However, some federal courts have concluded that a plea
3 agreement which waives the right to file a direct appeal or a
4 section 2255 motion is not enforceable if the waiver was
5 involuntary or if the defendant's counsel was ineffective in
6 negotiating the agreement. See, e.g., Jeronimo, 398 F.3d at
7 1156 (concluding the court did not have jurisdiction to consider
8 the appeal of a defendant who had waived this right in a plea
9 agreement because the agreement was knowing and voluntary on its
10 face, stating: "A defendant's waiver of his appellate rights is
11 enforceable if (1) the language of the waiver encompasses his
12 right to appeal on the grounds raised, and (2) the waiver is
13 knowingly and voluntarily made"); United States v. White, 307
14 F.3d 336, 343 (5th Cir. 2002); United States v. Cockerham, 237
15 F.3d 1179, 1182 (10th Cir. 2001) (concluding that a collateral
16 attack alleging ineffective assistance of counsel in negotiating

18 ¹ In Williams, the Eleventh Circuit states:

19 [E]very Circuit to have addressed the issue has held that a valid
20 sentence-appeal waiver, entered into voluntarily and knowingly,
21 pursuant to a plea agreement, precludes the defendant from
22 attempting to attack, in a collateral proceeding, the sentence
23 through a claim of ineffective assistance of counsel during
24 sentencing. See United States v. White, 307 F.3d 336, 341-44
25 (5th Cir. 2002); Garcia-Santos v. United States, 273 F.3d 506,
26 508-09 (2d Cir. 2001); Davila v. United States, 258 F.3d 448,
27 451-52 (6th Cir. 2001); United States v. Cockerham, 237 F.3d
28 1179, 1183-87 (10th Cir. 2001), cert. denied, 534 U.S. 1085, 122
S.Ct. 821, 151 L.Ed.2d 703 (2002); Mason v. United States, 211
F.3d 1065, 1069-70 (7th Cir. 2000)... We are persuaded by the
foregoing consistent line of authority from our sister Circuits
on this issue, particularly since a contrary result would permit
a defendant to circumvent the terms of the sentence-appeal waiver
simply by recasting a challenge to his sentence as a claim of
ineffective assistance, thus rendering the waiver meaningless.

396 F.3d at 1342.

1 a plea agreement may be brought notwithstanding a waiver of this
2 right in the agreement, stating: "Such agreements waiving the
3 right to appeal are subject to certain exceptions, including
4 where the agreement was involuntary or unknowing, where the
5 court relied on an impermissible factor such as race, or where
6 the agreement is otherwise unlawful."); Bridgeman v. United
7 States, 229 F.3d 589, 591 (7th Cir. 2000). Because Movant
8 asserts his counsel was ineffective and implies that he did not
9 knowingly and voluntarily enter into the agreement, the Court
10 will discuss the merits of these contentions.

11 **B. Voluntariness of plea agreement**

12 To determine the validity of a guilty plea, the Court
13 must ascertain whether the plea represented a voluntary and
14 intelligent choice among the alternative courses of action open
15 to the defendant. See Hill v. Lockhart, 474 U.S. 52, 56, 106 S.
16 Ct. 366 (1985).

17 In the plea agreement itself and at the proceeding
18 regarding entry of the guilty plea, Movant was informed that, by
19 entering into the plea agreement, he was giving up his right to
20 appeal his conviction and sentence and to collaterally attack
21 his conviction and sentence. Movant indicated at that time he
22 knew he was relinquishing these rights by entering into the plea
23 agreement. See Docket No. 183. When Movant entered his guilty
24 plea, the Court concluded Movant was knowingly and voluntarily
25 entering a guilty plea, and that Movant was competent to enter
26 his plea of guilty. Docket No. 165.

27 Movant's contemporaneous statements regarding his
28 understanding of the plea agreement carry substantial weight in

1 determining if his entry of a guilty plea was knowing and
2 voluntary. See United States v. Mims, 928 F.2d 310, 313 (9th
3 Cir. 1991); United States v. Walker, 160 F.3d 1078, 1096 (6th
4 Cir. 1998) ("a straightforward and simple 'Yes, your Honor' is
5 sufficient to bind a defendant to [the] consequences [of a plea
6 agreement]."). The Court may properly credit a defendant's
7 testimony at a hearing regarding the entry of a guilty plea over
8 any subsequent declarations to the contrary. See United States
9 v. Castello, 724 F.2d 813, 815 (9th Cir. 1984). Because Movant
10 was adequately informed of the consequences of his plea, his
11 guilty plea can be considered voluntary and knowing. See Boykin
12 v. Alabama, 395 U.S. 238, 242-43, 89 S. Ct. 1709, 1712 (1969).
13 Because Movant stated at the time of his guilty plea that the
14 plea was knowing and voluntary, the Court concludes the plea was
15 voluntary and intelligently made. See Chizen v. Hunter, 809
16 F.2d 560, 562 (9th Cir. 1986); United States v. Kamer, 781 F.2d
17 1380, 1383 (9th Cir. 1986). See also United States v.
18 Rubalcaba, 811 F.2d 491, 494 (9th Cir. 1987) ("Solemn
19 declarations in open court carry a strong presumption of
20 verity").

21 **C. Movant asserts he is entitled to relief because he**
22 **was deprived of the effective assistance of counsel.**

23 Movant asserts he was deprived of his right to the
24 effective assistance of counsel.

25 A defendant who enters a guilty plea on the advice of
26 counsel may attack the voluntary and intelligent character of
27 the plea by showing that counsel acted incompetently by advising
28 defendant to accept the plea. See Jeronimo, 398 F.3d at 1156

1 n.4²; Shah v. United States, 878 F.2d 1156, 1156 (9th Cir. 1989).
2 To establish counsel was ineffective during plea proceedings,
3 the two-part test stated in Strickland v. Washington, 466 U.S.
4 668, 104 S. Ct. 2052 (1984) is applied. See Hill, 474 U.S. at
5 59, 106 S. Ct. at 370. The defendant must show counsel's advice
6 as to the consequences of the plea was not within the range of
7 competence demanded of criminal attorneys and that, but for
8 counsel's advice, he would not have pleaded guilty. Id., 474
9 U.S. at 58-59, 106 S. Ct. at 369-70; Doganieri v. United States,
10 914 F.2d 165, 168 (9th Cir. 1990).

11 Movant's counsel was not incompetent for recommending
12 that Movant accept the terms of the plea agreement, which
13 guaranteed Movant a five-year sentence on one count rather than
14 proceeding to trial and facing a potential sentence of forty
15 years imprisonment on each of the two counts charged.
16 Accordingly, Movant offers no specific reason why, but for
17 counsel's advice, he would have rejected the plea agreement and
18 proceeded to trial.

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22 We leave open the possibility that [the defendant] might
23 raise his ineffective assistance argument on federal habeas
24 procedure, through a § 2255 motion, notwithstanding that
25 [his] appeal waiver covered "all his waivable statutory
26 rights to file a petition pursuant to 28 U.S.C. § 2255
27 challenging the length of his sentence.
28 Although a defendant may waive the statutory right to file
a § 2255 petition "challenging the length of his sentence,"
we do not decide whether such language would necessarily
encompass a claim challenging the knowing and voluntary
nature of the plea agreement (and accompanying waiver of §
2255 rights). Further, we do not decide whether even an
express waiver of all § 2255 rights could be enforced to
preclude an ineffective assistance claim implicating the
voluntariness of the waiver itself.

1 Movant has not averred how counsel's advice to accept
2 the plea agreement was deficient nor has Movant established a
3 reasonable probability that, but for his counsel's advice, he
4 would have proceeded to trial. Therefore, Movant is not
5 entitled to relief pursuant to section 2255 on the basis of his
6 claim that he was deprived of the effective assistance of
7 counsel in his plea proceedings.

8 **III. Conclusion**

9 Movant waived his right to collaterally attack his
10 sentence in his plea agreement and, therefore, the Court may
11 dismiss this action without addressing the merits of Movant's
12 claims for relief. Movant has not established that his plea
13 agreement was unknowingly or involuntarily made, and Movant has
14 not established he was deprived of the effective assistance of
15 counsel in his plea proceedings, rendering his plea agreement
16 unknowing or involuntary.


17 **IT IS THEREFORE RECOMMENDED** that Mr. Arredondo-
18 Zazueta's Motion to Vacate, Set Aside, or Correct Sentence, be
19 **denied and dismissed with prejudice.**

20 This recommendation is not an order that is immediately
21 appealable to the Ninth Circuit Court of Appeals. Any notice of
22 appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate
23 Procedure, should not be filed until entry of the district
24 court's judgment.

25 Pursuant to Rule 72(b), Federal Rules of Civil
26 Procedure, the parties shall have ten (10) days from the date of
27 service of a copy of this recommendation within which to file
28 specific written objections with the Court. Thereafter, the

1 parties have ten (10) days within which to file a response to
2 the objections. Failure to timely file objections to any
3 factual or legal determinations of the Magistrate Judge will be
4 considered a waiver of a party's right to de novo appellate
5 consideration of the issues. See United States v. Reyna-Tapia,
6 328 F.3d 1114, 1121 (9th Cir.) (en banc), cert. denied, 540 U.S.
7 900 (2003). Failure to timely file objections to any factual or
8 legal determinations of the Magistrate Judge will constitute a
9 waiver of a party's right to appellate review of the findings of
10 fact and conclusions of law in an order or judgment entered
11 pursuant to the recommendation of the Magistrate Judge.

12 DATED this 24th day of April, 2006.

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15 Mark E. Asper
16 United States Magistrate Judge
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